

Recommendations to Department of Labor to Reduce or Eliminate New Awards of 14(c) Certificates

The Autistic Self Advocacy Network (ASAN), the National Disability Leadership Alliance (NDLA), the Collaboration for the Promotion of Self-Determination (CPSD) and the undersigned organizations have identified the following steps that the Department of Labor can take, without need for legislative reform, to help reduce the number of employers authorized to pay people with disabilities less than minimum wage. We continue to urge the Secretary to issue a statement urging Congress to responsibly phase out and repeal Section 14(c) of the Fair Labor Standards Act and applaud the Secretary's statement last month urging states to take action to eliminate 14(c) within their borders. In addition to this step, we have developed a list of recommendations for the Department of Labor to improve enforcement and update regulations surrounding Section 14(c) as this outdated model acts as a barrier to access to competitive, integrated employment.

Section 14(c) of the Fair Labor Standards Act (FLSA) requires that all employers who pay sub-minimum wages to people with disabilities obtain a special certificate from the Department of Labor (DOL). DOL can only award such certificates "to the extent necessary to prevent curtailment of opportunities for employment" of individuals whose "earning or productive capacity is impaired" by age or disability. Employers must also certify that they are paying workers a wage that is "commensurate" with the wages paid to similarly situated nondisabled workers and related to their workers' productivity.¹

1. Update regulations to reflect the Americans with Disabilities Act and the *Olmstead* decision.

Existing regulations require that DOL, when it determines whether a 14(c) certificate is "necessary to prevent curtailment of opportunities for employment," consider the "nature and extent" of employees' disabilities as they relate to productivity, the prevailing wages for nondisabled employees performing the same work, and the productivity of employees with disabilities as compared to nondisabled employees.²

These criteria were issued in 1989, 54 Fed. Reg. 32928 (Aug. 10, 1989), prior to passage of the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead*. As a result, they do not explicitly take into account the extent to which reasonable accommodations or integrated employment supports could improve individuals' ability to work for competitive wages.

¹ 29 U.S. Code § 214(c).

² See 29 C.F.R. § 525.9(a) ((

They also fail explicitly to consider whether employees could be more productive or earn higher wages performing different tasks more tailored to their skills, or the degree to which existing supported employment or vocational rehabilitation services could help them attain employment at above-minimum wages. As a result, these factors are not routinely considered in awarding 14(c) certificates.³

This year, Congress passed the Workforce Innovation and Opportunity Act (WIOA), which further limits situations in which a 14(c) certificate holder may pay subminimum wages to employees under the age of 24.⁴

Proposed Executive Actions:

- **Amend or issue guidance interpreting 29 C.F.R. § 525.9** to require that DOL consider other factors – such as availability of reasonable accommodations, supported employment, vocational rehabilitation services, and customized employment – when determining whether a sub-minimum wage certificates are truly “necessary” to provide employment opportunities to people with disabilities. Such considerations would be consistent with the plain language of the FLSA and are consistent with the new provisions in WIOA. For example, it would not be appropriate to award a 14(c) certificate to an entity that was not providing all reasonable accommodations to their employees or that existed in an area in which supported employment services were serving individuals with comparable disabilities in competitive, integrated employment.
- **Make interim changes in the 14(c) approval process** ensuring that DOL will consider available accommodations and services, including supported employment, when evaluating the factors enumerated in existing regulations. For example, when evaluating “the nature and extent of the disabilities of the individuals employed as these disabilities relate to the individuals’ productivity,” DOL should consider ways in which accommodations or supported employment services could ameliorate the effects of an individual’s disability on productivity. This process may require amending the existing 14(c) application forms, WH-226 and WH-226A, to include questions about the services employees receive in the workplace (including Medicaid-funded pre-employment services) and the accommodations provided when evaluating productivity. It may also require DOL to familiarize itself with the prevailing wages paid to individuals with similar disability-related needs in the area who are receiving supported employment services.

³ See, e.g., Forms WH-226 and WH-226A, OMB # 1235-0001, available at <http://www.dol.gov/whd/forms/wh226.pdf>, <http://www.dol.gov/whd/forms/wh226a.pdf>.

⁴ Pub. L. No. 113-128 § 458 (Jul. 22, 2014) (adding a new Section 511 to Title V of the Rehabilitation Act of 1973).

2. Ensure Meaningful Review of Commensurate Wage Determinations

FLSA requires that employers holding 14(c) certificates pay their workers in relation to their productivity. They may accomplish this by paying piece rates or through paying a special discounted hourly wage that is based on the prevailing wage paid to experienced nondisabled workers in the vicinity performing comparable work, and then discounted based on the employer's evaluation of its employees' productivity.⁵

There is reason to believe that these assessments are flawed. Individuals with disabilities who transfer from 14(c) employment to competitive employment experience an average wage increase of more than 200%.⁶ Because it is unlikely that these individuals somehow became less disabled when they changed employers, it is likely that their employers underestimated their productivity when calculating their wages. The National Disability Rights Network has found that 14(c) certificate holders may deny accommodations that increase productivity or otherwise manipulate productivity assessments in order to deflate workers' wages.

Proposed Executive Actions:

- Ensure that workers have access to a full array of reasonable accommodations, including adaptive equipment, during productivity measurements.
- Require independent third-party review of productivity measurements.⁷
- Increase monitoring and enforcement of DOL's existing requirement that employees – including those paid at piece rates – be paid for down time during which they are at work but not producing due to factors outside their control. Crack down on attempts by workshop operators to classify recreational activities (such as playing cards) during periods of down time as “rehabilitation services” and thus avoid compensating their employees for that time.⁸
- Publish data on operations of individual 14(c) certificate-holders, including average actual wages paid under the certificate; compensation paid to chief executive officers and management personnel; fees charged to employees for transportation, food, or other services; Medicaid funding received for “pre-employment” or other services provided during work hours; and rate of graduation to competitive integrated employment.⁹

⁵ 29 C.F.R. § 525.12.

⁶ National Disability Rights Network, *Segregated and Exploited* 29 (2011).

⁷ See *id.* at 49.

⁸ See Dep't of Labor, *Fact Sheet #39C: Hours Worked and the Payment of Special Minimum Wages to Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)* (2008) (when an employer provides “rehabilitation services” during extended periods of down time, it does not need to pay employees for this time).

⁹ National Disability Rights Network, *Segregated and Exploited* 49 (2011).

The proposed avenues of executive action can act as a complement to efforts by other departments and offices within DOL to promote competitive integrated employment, including:

- Department of Health and Human Services' recently issued regulations restricting Medicaid home and community services (HCBS) funding to services in settings that are integrated into the community and provide opportunities for competitive integrated employment;
- Department of Justice's recent lawsuits against states that provide inadequate access to supported employment services while continuing to fund placements in sheltered workshops; and
- Office of Federal Contract Compliance Programs's recently issued regulations requiring federal contractors to take affirmative steps to recruit, hire, retain, and promote individuals with disabilities.

By reducing the number of employers holding special wage certificates, DOL can help ensure that every person with a disability has access to real competitive, integrated employment.

Signatories:

Autistic Self Advocacy Network
ADAPT
American Association of People with Disabilities
Association of University Centers on Disabilities
Association of People Supporting Employment First
Association of Programs for Rural Independent Living
Autism Society
Bazelon Center for Mental Health Law
Council of Parent Attorneys and Advocates
Disability Power and Pride
Institute for Educational Leadership
Little People of America
National Council on Independent Living
National Disability Rights Network
National Federation of the Blind
National Coalition on Mental Health Recovery
National Disability Institute
National Down Syndrome Congress
National Down Syndrome Society
National Fragile X Foundation
National Organization on Disability
Not Dead Yet
SEIU
Quality Trust for Individuals with Disabilities
TASH
United Spinal Association